IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 961

RALPH W. WHITE, Administrator of the Estate of Mary Vieux Bruno, deceased; JOHN A. BRUNO, ETHEL BRUNO SHOPWETUCK, MARY BRUNO WEBB, OSE BRUNO DE-LONAIS, NORA BRUNO KEMOHAH, JOHN A. BRUNO, JR., and EVELINE BRUNO CODY, *Petitioners*,

v.

SINCLAIR PRAIRIE OIL COMPANY, a corporation; THE PRAIRIE OIL AND GAS COMPANY, a corporation; MID-KANSAS OIL AND GAS COMPANY, a corporation, and the OHIO OIL COMPANY, a corporation, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS.

To the Honorable Justices of the Supreme Court of the United States:

The petitioners, Bruno, are Pottawatomie Indians in Oklahoma who claim that under a specific and valid written contract of compromise and settlement they have been deprived by the courts below of oil royalties to which they are entitled in a sum in excess of $250,000.00.

Certiorari is sought in the instant case because the Courts below entirely misconceived the true nature of the cause of action, treating a specific contract of compromise and settlement for payment of Indian oil land royalties as one to be controlled entirely by the extent of ownership in the oil lands themselves.

The petitioners are Ralph W. White, administrator of the estate of Mary Vieux Bruno, deceased; John A. Bruno, and the following children of John and Mary Bruno: Ethel Bruno Shapewetuck, Mary Bruno Webb, Ose Bruno DeLonias, Nora Bruno Kemohah, John A. Bruno, Jr., and Eveline Bruno Cody.

The respondents are the Sinclair Prairie Oil Company, the Prairie Oil and Gas Company, the Mid-Kansas Oil and Gas Company, and the Ohio Oil Company, each a corporation.

The United States District Court for the Northern District of Oklahoma rendered a summary judgment in favor of the defendants, the respondents in this court. This judgment was affirmed by the U. S. Circuit Court of Appeals for the 10th Circuit on November 16, 1943. Petition for rehearing was denied on January 3. An order was entered by this Honorable Court extending the time for the filing of this petition up to and including May 3, 1944.

In support of this petition, the petitioners respectfully show:

STATEMENT.

John A. Bruno (hereinafter called John) and Mary Vieux Bruno (hereinafter called Mary) were each a member of the Citizen Band of the Pottawatomie tribe of Indians in Oklahoma in 1891. In that year John was allotted 320 acres, and Mary 120 acres of Indian land. Trust patents were issued by the United States conveying the allotment to each in trust (T. 125). These allotments were made and trust patents issued under the provisions of the general allotment act of February 8, 1887 (24 Stat.

388, Sec. 5, 25 U. S. C. A. 348). Under the provisions of the Act of August 15, 1894 (28 Stat. 286, 295), such allottees were privileged to sell and convey, subject to the approval of the Secretary of the Interior, all allotted land except 80 acres which could not be sold or disposed of during the trust period of twenty-five years, even with the approval of the Secretary (T. 126).

John and Mary were married on February 26, 1892. John had sold, with approval, all his allotted land except the NW ¼ of Sec. 25, T. 7 N. R. 4 E. of 160 acres. Mary had sold, with approval, all but 80 acres of her allotted land and her remaining 80 acres was 40 miles from John's 160. Mary wanted to acquire John's south 80, sell her distant 80 acres and turn over the proceeds of the sale to John to improve his North 80 acres as a homestead. That arrangement would make contiguous the 80-acre tract each was required to retain during the trust period. They were advised by the U. S. Indian agent at the Agency at Shawnee, Oklahoma Territory, that John could deed his South 80 acres to Mary; that both could join in a deed to convey Mary's distant 80, and that John could have the selling price to improve his remaining North 80. Accordingly, on March 19, 1903, John executed a deed to Mary for his South 80, and Mary and John joined in a deed to one Chapman for Mary's distant 80. The agent delayed forwarding the deeds to the Department of the Interior for approval, and then questioned the proposed transaction in view of the fact that Mary, under existing law, should not be permitted to convey her remaining allotment of 80 acres. The agent then advised that John could relinquish to the United States his entire 160 acres, and that the North ½ could be re-allotted and new trust patent issued to him, and that the South 80 could be re-allotted and a trust patent issued to Mary.

Pursuant to instructions, John on June 17, 1903 relinquished (T. 88) his allotment and trust patent to the 160 acres to the United States and on the same day the agent

transmitted the same to the Indian office by letter and recommended approval (T. 84). In connection with his relinquishment, John requested that a new trust patent be issued to him for the North 80, and a trust patent issued to his wife, Mary, for the South 80. On July 20, 1903, the Commissioner of Indian Affairs transmitted John's relinquishment to the Secretary of the Interior (T. 85) recommending that John's trust patent be cancelled and that a trust patent be issued to John for the North 80, and a trust patent to Mary for the South 80 of John's relinquished quarter section. The Secretary of the Interior on July 23, 1903 approved the relinquishment, cancelled John's original trust patent (T. 88) and transmitted the cancelled patents to the Commissioner of the General Land Office and directed that new trust patents be issued, one to John for the North 80, and one to Mary for the South 80 (T. 88, 89).

A new trust patent was issued to John on June 22, 1904 (T. 90, 91) and on the same day a new trust patent was issued to Mary for the South 80 (T. 30, 31).

In the meantime, on November 21, 1903, the deed from John to Mary of date of March 19, 1903 was inadvertently approved by the Secretary of the Interior. The Circuit Court of Appeals for the 10th Circuit held that when John's deed was approved it related back to its date and vested an unrestricted title in Mary as of March 19, 1903. In the meantime, John had relinquished his allotment and trust patent thereto. The relinquishment to the United States had been approved, the trust patent had been cancelled, and all of John's right, title and interest in the entire northwest quarter of Sec. 25 had revested in the United States. This was approximately four months before John's deed was approved, so that there was no title in John to which John's deed could relate back and vest in Mary in 1903. On March 2, 1904, John's deed to Mary was recorded in the office of the Register of Deeds of Pottawatomie County.

The Brunos executed mortgages of a few hundred dollars to one Boggs on February 5 and on March 14, 1904 (T. 126). Foreclosure judgments were procured in 1910 and Mary's South 80 acres for which she held the trust patent of June 22, 1904 was sold at foreclosure sale to M. C. Getzelman, who afterwards conveyed to B. C. Getzelman (T. 126). Thereafter the Brunos filed suit in the State courts to vacate the judgments of foreclosure on the theory that Mary was the record, restricted owner of said South 80 acres under her trust patent of June 22, 1904. The suit was unsuccessful and the judgment therein was affirmed by the Supreme Court of Oklahoma on June 11, 1918, *Bruno* v. *Getzelman*, 70 Okla. 143, 173, p. 850.

W. H. Desmond, on June 8, 1925, made an oil and gas lease to Prairie Oil and Gas Company to the East 40 of the said South 80 acres (T. 18-21). About this time, B. C. Getzelman and wife, one Wells and wife, and one James made an oil and gas lease on the West 40 of said South 80 to one McKown, which time time by assignment came into the possession of Mid-Kansas Oil and Gas Co.

Both leases contained a provision that if the lessor owns less than an entire undivided fee simple estate, he shall receive royalty only in the proportion which his interest bears to the entire fee (T. 20 and 23).

On March 22, 1928, Mary's trust patent to the entire South 80 was recorded in the office of the County Clerk, ex officio Register of Deeds, at Pottawatomie County, Oklahoma, whereby she became the record owner. Several months thereafter, or on May 28, the Prairie Oil and Gas Co. began drilling on the East 40 and the Mid-Kansas Oil and Gas Company began drilling on the West 40. By September 22, 1928, these companies had completed four wells with flush production of 7,007 barrels of oil per day.

The Brunos were about to file suit to cancel the leases on the South 80 when, on September 22, 1928, a compromise and settlement contract was entered into by the Oil companies and the Brunos (Exhibits C, T. 25; Ex. D,

T. 27). This compromise and settlement contract is the basis of this litigation. This contract (Ex. C, T. 25) recites, *inter alia,* that whereas Mary claims title to the 80 acres, which claim is denied by the said companies, "said companies are willing, in order to avoid litigation, to settle and compromise said claim, insofar as said claim involves or affects the validity of their said oil and gas leases".

The settlement contract of September 22, 1928, provides:

> "Now, Therefore, it is agreed that said Mary Bruno, joined by her husband, John A. Bruno, and by their attorney, Claude Hendon, does hereby ratify, adopt and approve said oil and gas leases so held by said Companies as fully as though she and they had originally executed such leases at the date of the execution thereof and for the consideration paid therefor; so that they or either of them will have no further claim of any kind or character, except as to royalties to be paid under said leases, as against said Companies, or either of them, after the execution hereof."

The contract contemplated additional conveyances necessary to render the settlement agreement fully effective:

> "In consideration of this agreement and settlement the said Prairie Oil and Gas Company and Mid-Kansas Oil and Gas Company agree to pay to said Mary Bruno and her said attorney the sum of Eight Thousand Dollars, of which sum Two Thousand Dollars shall be paid within ten days after the execution hereof, and the remaining Six Thousand ($6,000.00) Dollars shall be paid upon the execution and delivery of such conveyances as may be necessary to render this settlement fully effective, bearing the approval of the Honorable The Secretary of the Interior, if required."

After some delay, on March 14, 1930, and in pursuance of the terms of the settlement contract of September 22, 1928, calling for additional conveyances and acquittances that may be necessary to render the settlement agreement

fully effective, the Brunos did execute a further conveyance and acquittance which provides that:

> "said Prairie Oil and Gas Company to have and to hold said lease, free and clear of any claims or demands of the said Mary Bruno and John A. Bruno, their heirs or assigns the same and as fully as though they or either of them had originally executed said lease at the time of the execution thereof and for the consideration paid therefor so that they or either of them will have no further claim of any kind or character as against the Prairie Oil and Gas Company EXCEPT AS TO ROYALTY TO BE PAID UNDER SAID LEASE WHICH ROYALTIES AMOUNT TO ONE-EIGHTH (⅛) OF THE OIL PRODUCED FROM SAID LEASE THE SAID JOHN A. BRUNO AND MARY BRUNO EXPRESSLY RESERVES UNTO THEMSELVES, THEIR HEIRS AND ASSIGNS." (Emphasis supplied) (T. 29)

An identical provision was contained in this conveyance with respect to the Mid-Kansas Oil and Gas Company Lease.

The conveyance concluded with this language:

> "This instrument shall become effective when signed and acknowledged by the said John A. Bruno and Mary Bruno and delivered to the Pairie Oil and Gas Company, a corporation, and Mid-Kansas Oil and Gas Company, a corporation, after the same shall have first been presented to the Honorable Secretary of the Interior for his approval if such approval is required."

The approval of the Secretary of the Interior was indorsed on this conveyance on May 2, 1930 (T. 150).

The respondents in this cause refused to comply with the terms of the contract with respect to the payment to the Brunos of oil royalties. On November 25, 1932, Mary and John filed suit in the State court to enforce the contract and recover ⅛ royalties. That suit was removed to the U. S. District Court for the Northern District of

Oklahoma and dismissed on motion of the Brunos without prejudice on March 31, 1933 (T. 53). Thereupon, on November 2, 1933, a suit was filed by the U. S. to declare void and to cancel all deeds, mortgages, and to quiet its title to the land in trust and to recover the value of all oil and gas produced. In that suit the U. S. set itself up as the party plaintiff, asserted that it was the legal owner of the land in question, holding the same in trust for Mary Bruno, who was not named as a party. In that case the trial court found as against the U. S. and the judgment thereafter was affirmed by the 10th Circuit Court of Appeals. *U. S.* v. *Getzelman*, 89 F (2d) 531. Thereafter certiorari was refused, 302 U. S. 708, 82 L. Ed. 547. The Court held that the deed from John to Mary upon the approval thereof of the acting Secretary of the Interior on November 21, 1903, vested title in Mary to the South ½ of the Northwest ¼ of Section 25 as of March 19, 1903, free and clear of all restrictions against alienation and that the defendants' divers assignees acquired title under the mortgage foreclosure judgment, notwithstanding title had been re-invested in the U. S. by the relinquishment of John to the United States some months prior to the dates of the mortgages.

JURISDICTION.

Jurisdiction is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A. Sec. 347.

JUDGMENT SOUGHT TO BE REVIEWED.

Judgment sought to be reviewed is of date of November 16, 1943. The petition for rehearing was denied on January 3, 1944.

QUESTIONS PRESENTED.

The question presented is whether an explicit contract f compromise and settlement for payment of Indian oil and royalties is to be controlled entirely by the extent of he contractors' ownership in the oil lands themselves.

There is the further question as to whether a contract f compromise and settlement bottomed on forbearance in he matter of filing suit could be invalidated by separate itigation as to title initiated approximately five years sub-equent to the execution of the contract.

REASONS FOR GRANTING THE WRIT.

There are several reasons for granting the writ:

1. The opinion and judgment of the Tenth Circuit Court f Appeals creates a diversity of views and judgment be-ween that Circuit and the United States Court of Appeals or the Eighth Circuit in the following respects:

The Tenth Circuit in the instant cause holds specifically hat the petitioners "having failed to establish any claim r title to the leased premises are not entitled to any royal-ies."

In an analogous Indian oil case, *Kiefer Oil and Gas 'ompany* v. *McDougal*, 229 Fed. 933, 939, the U. S. Circuit 'ourt of Appeals for the Eighth Circuit "upheld a com-romise agreement under which the appellant was com-elled to pay the appellee a bonus and one-fifth of the oyalties, although, as held by the Court, subsequent to the ompromise agreement, McDougal had no right, title or nterest in the land or the oil or gas therein".

(The language quoted interpretative of the Kiefer case s taken verbatim from the opinion of Judge Williams of he U. S. District Court for the Eastern District of Okla-oma, in the case of *Derrisaw* v. *Schaffer, et al.*, 8 Federal Supplement, 878, 9.)

2. The second reason for granting the writ is the im-ortance of this case in the administration and protec-

tion of the Indian wards of the United States and the property vested in them either outright or in trust by the United States.

3. A third reason for granting the writ resides in the fact that the opinion and judgment of the Tenth Circuit Court of Appeals is at variance not only with the views of the 8th Circuit as expressed in the Kiefer case, but with the law as enunciated by divers State Courts:

> "And it is held quite universally that where the parties are mistaken as to the law, they are nevertheless bound by a contract of compromise." *Kiefer Oil and Gas Company* v. *McDougal*, 229 Fed. 933, 939.

PRAYER FOR WRIT.

Wherefore, petitioners pray for a writ of certiorari to be issued under the seal of this Court directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding that Court to certify and send to this Court a complete transcript of the record and all proceedings in the instant cause so that this cause may be reviewed and determined by this Court, and so that the judgment of the United States Circuit Court of Appeals for the Tenth Circuit may be reversed and that the petitioners may be granted such other and further relief as may seem proper.

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PETITIONERS' BRIEF IN SUPPORT OF THEIR PETITION FOR WRIT OF CERTIORARI.

THE OPINION OF THE COURT BELOW.

There was no formal opinion of the United States District Court for the Northern District of Oklahoma. However, the judgment consists of more than three printed pages which are set forth on pages 118-121 of the Transcript. The opinion of the United States Circuit Court of Appeals for the Tenth Circuit Court was rendered on November 16, 1943, and rehearing denied on January 3, 1944. It is reported in 139 Fed. (2d) 103.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

Petition to which this brief is attached sufficiently states the grounds on which the jurisdiction of this Court is invoked.

STATEMENT OF THE CASE.

Petition to which this brief is attached sufficiently states all the facts that are material to a consideration of the questions presented.

SPECIFICATION OF ERRORS ASSIGNED.

The trial court and the United States Circuit Court of Appeals for the Tenth Circuit erred in ruling that a contract of compromise and settlement with respect to the matter of forbearing from filing suit to collect Indian oil land royalties could be invalidated by subsequent litigation determining that the claimants of the royalties had no right, title or interest in the lands in question.

SUMMARY OF ARGUMENT.

1. A contract of compromise and settlement, having as its consideration an agreement to forbear from filing suit affecting the title to Indian oil lands and for the recovery of royalties therefrom, may not be invalidated by litigation initiated approximately five years later resulting in findings that the claimants as to the royalties had no title or interest in the oil lands in question.

2. The question of title was removed as an issue by the contract of compromise.

3. Subsequent litigation on the part of the United States, designed among other things to quiet title in oil lands, could have no bearing on the prior contracts of compromise and settlement.

4. Reservations in the contract of compromise and settlement and the ratification thereof retained the right to royalties in the claimants thereto.

5. A suit to quiet title could not be res adjudicata as to a contract of settlement and compromise.

ARGUMENT.

The Courts below entirely overlooked and disregarded the exceptions and reservations contained in the compromise and settlement contract and ratification. The Circuit Court of Appeals said with respect to the petitioners:

> "It placed them in the position of the original lessors under the leases. Such ratification embraced the leases in their entirety, including the provision that if the lessor owns less than an entire undivided fee simple estate he shall receive royalty only in the proportion which his interest bears to the entire fee."

But these exceptions and reservations are there in the very language of the contract. We very respectfully submit that these are particularly controlling when interpreted in accordance with Oklahoma law.

Indeed, the trial court in rendering its judgment twice proceeds to find that the petitioners made reservations with respect to royalties both in the original contract and the ratification thereof (Tr. 118-120).

There is no occasion for the use in the contract (Exhibit C) of this language:

> "so that the Brunos or either of them will have no further claim of any kind or character, *except as to royalty* to be paid under said leases as against said companies, or either of them after the execution hereof." (Italics supplied.)

and there is no occasion whatsoever for the use in the ratification instrument of the language:

> "* * * except as to royalties to be paid under said lease, which royalties amounting to one-eighth of the oil produced from said lease the said John A. Bruno and Mary Bruno expressly reserve unto themselves, their heirs and assigns"

unless payment of a separate royalty to the Brunos in oil or money in the amount specified was intended by the contracting oil companies.

Indeed, what occasion could there have been for references to the Brunos' interest in royalties in either instrument unless an explicit commitment was contemplated in the original contract and definitely in the ratification?

It is of the very greatest significance that in March, 1928, some months before any drilling was commenced on the land in question, Mary Bruno filed of record her Government trust patent. This significant fact, not even mentioned by the Circuit Court of Appeals, provides the reason for the oil Companies being willing to enter into the contract and ratification in question. The filing of this patent served to create a cloud on a very valuable leasehold. At the time the original contract was executed, four wells were producing 7,007 barrels of oil per day. The Oil Companies obviously desired to fully develop their leases, and by December 28 had fully developed their leases by the drilling of four additional wells with total flush production of 12,279 barrels per day, and they wanted no impairment of the valuable rights they were enjoying and probably considered the commitment of royalties to the Brunos cheap insurance as against the possibility of great losses.

The Circuit Court of Appeals bottoms its conclusion on the finding that:

> "ratification embraces the leases in their entirety, including the provision that if the lessor owns less than an entire undivided fee simple estate, he shall receive royalties only in the proportion which his interest bears to the entire fee."

This view of the case not only ignores the specific reservations cited but would call for a construction of the instruments that would cause the petitioners to forbear from litigation that conceivably might net them millions for a consideration totaling only $8,000.

The construction placed on these instruments by the trial and appellate courts is tortured in the greatest respect. It ignores the plain language of the contracts providing for royalties. Indeed, the appellate court seeks to rewrite the instruments, suggesting that if supplementary royalties were to be paid the Brunos that something regarding an overriding royalty should have been written into the contract.

Any reasonable construction of these contracts will make it clear that reservation and exception along the lines hereinbefore described were intended by the contracting parties.

In the case of *Dunlap* v. *Jackson*, 92 Okla. 246, 218 Pac. 314, the Oklahoma Supreme Court quoted with approval the following language from *Stone* v. *Stone*, 141 Iowa, 438, 119 N. W. 712:

> "A reservation is never part of the estate itself, but is something taken back out of that *already* granted, as rent, or right to cut timber, or the right to do something in relation to the estate."

The court after reveiwing a number of authorities concluded as following:

> "Counsel for all parties have ably briefed the case, and have been of great assistance to the court in arriving at a decision, and after a patient review of the authorities and an examination of the record, and of the reservation in the various deeds, we have reached the conclusion that the reservations made in the deeds from Engles to the Bruners and from the Bruners to the Engles, and which were perpetuated and carried into the deed from the Engles to Dunlap and from the Bruners to the plaintiff, Pearl P. Jackson, under the authorities cited herein, are valid reservations,

> and that upon the discovery and production of oil on the quarter section involved, the defendant Dunlap, and plaintiff, Pearl B. Jackson, are entitled to take the royalty from the production of oil and gas from said quarter section in the proportion as provided in the reservations in their respective deeds. Having reached this conclusion we hold that the court below erred in entering judgment on the pleadings in favor of the plaintiff, Pearl B. Jackson, for the entire royalty from the '40 acres' owned by her, and for that error the case is reversed and remanded to the trial court, with directions to set aside the judgment and proceed with this case according to the views herein expressed."

These instruments were drawn in Oklahoma; they related to Indian residents of Oklahoma; they dealt with the interest of petitioners as to royalties in Indian oil lands situated in Oklahoma, and were to be performed in Oklahoma. Hence, the foregoing holdings of the Court of last resort of Oklahoma is particularly controlling in view of the doctrine enunciated by this Honorable Court in *Erie Railroad* v. *Tompkins,* 302 U. S. 671; 82 L. Ed. 518.

The matter of forbearance in filing suit is not only approved as being adequate consideration, but in reality is favored by the courts. Citation of authority other than *Kiefer Oil and Gas Company* v. *McDougal,* 229 F. 933-939 hardly is required. The proposition is elementary.

The Kiefer case held at p. 939:

> "And it is held quite uniformly that, where the parties are mistaken as to the law, they are nevertheless bound by the contract of compromise. Prout v. Pittsfield Fire District, 154 Mass. 450, 28 N. E. 679; Fidelity & Casualty Company v. Gillette Hezoz Company, 92 Minn. 274, 99 N. W. 1123; City Electric Railway Company v. Floyd County, 115 Ga. 655, 42 S. E. 45; Lewis v. Cooper, Cooke (Tenn.) 467; Connor v. Ethridge, 3 Neb. (Unof.) 555, 92 N. W. 135; 5 Ruling Case Law, 898.
>
> "There is no question of fraudulent representation of the facts. Both parties understood the elementary

facts fully, but it is claimed that, as they did not understand the law as it was ultimately determined to be, this lead to a mutual mistake as to the ultimate fact of ownership; but this was one of the very matters in dispute at the negotiations. The representative of the Oil and Gas Company claimed at the time that they had a good title, and Mr. McDougal in substance said the courts must determine that. Then they compromised, and Mr. McDougal surrendered $20,000 of his bonus offered him by Shulthis and agreed to lose the remaining $5,000 if the Kiefer Oil and Gas Company, did not win its suit with Shulthis for an increased royalty, and agreed to turn the management of the litigation over to the Kiefer Oil and Gas Company. They took charge of the litigation and stood upon their rights under the lease and contract with McDougal as a defense, won their suit substantially on these alleged rights in the District Court, and now want to repudiate the contract because they ultimately won their case on other grounds in this court. This, under the facts shown here, they cannot do. The District Court was right in ordering that the sum in the hands of the receiver of $41,913.44 he paid to Mr. McDougal. The decree of the district court is affirmed."

The Circuit Court of Appeals as well as the trial court overlooked the fact that the contract sued on is not an oil and gas lease and that it contains no "lesser interest clause". The reservations, indeed, would be in direct conflict with any theory of the application of the "lesser interest" clause.

Little argument is required to support the proposition that the original contract of 1928 and the ratification of 1930 are to be considered as one instrument, in view of the specific terms of the original contract requiring a ratification and an approval on the part of the Secretary of the Interior.

The Circuit Court of Appeals calls attention to the fact that the ratification of the contract, containing the reservation of one-eighth royalties to the Brunos, their heirs

and assigns, was not signed by the Oil Companies. But the Court overlooked the fact that the contract sued on taken as a whole and construed as a whole is a *grant*, a conveyance and an acquittance which required only the signature of the grantors. It is true that both the Oil Companies and the grantors signed the initial contract of 1928. But the supplementary ratification by the terms of 1928 contract required the signatures of only the Brunos as grantors. Further, the conveyance and acquittance signed by the Brunos as grantors became binding on the grantees when accepted. After the ratification had been approved by the Secretary of the Interior, on March 2, 1930, the Oil Companies paid the balance of $6,000.00 as required by the contract and proceeded under the terms of the original leases and the contract and ratification of the Brunos to withdraw several million barrels of oil from the tract in question. The signing on the part of the Oil Companies was not contemplated by the earlier instrument. Their acceptance of the benefits constituted a complete ratification of the supplementary instrument. Further, there is nothing in the ratification of 1930 that in any wise tends to alter or to modify the provisions of the 1928 contract.

In the last analysis, the ratification must be construed as a document bearing the approval of the Secretary of the Interior which the Oil Companies felt they should have in order to insure the binding effect of the 1928 contract. It was for the Companies' benefit and for their benefit alone.

Of interest at this stage is a local statute of Oklahoma, Section 9668, Oklahoma Statutes, 1931; 16 Oklahoma Statutes, 1941, Sec. 11:

> "Any person or corporation having knowingly received and accepted the benefits of any part thereof of any conveyance mortgage or contract relating to real estate shall be concluded thereby and estopped to deny the validity of such conveyance, mortgage or contract, or the power or authority to make and execute the same, except on the ground of fraud * * *"

If there is any suggestion on the part of respondents in this case that there is occasion here for the application of the doctrine of laches, attention respectfully is called to *United States* v. *Dunn*, 268 U. S. 121, holding that one who claims the benefit derived from a breach of trust in which he actively participates and who shows no prejudice resulting from the delay in bringing suit to compel him to account, cannot complain of laches.

The Tenth Circuit Court of Appeals erred in applying the doctrine of res judicata and in holding that *United States* v. *Getzelman*, 89 Fed. 2d, 531—actually initiated approximately five years after the execution of the original contract—adjudicated the matters sought to be litigated in the case at bar. The following reasons are called to the attention of this Honorable Court:

a. The Getzelman case was a proceeding to quiet title in land. The case at bar is an action to recover oil royalties by virtue of an express contract between petitioners and the oil companies at bar.

b. The parties were not the same, nor substantially the same. The United States was the sole party plaintiff, although suing as legal owner to the land in which Mary had a beneficial interest. The defendants, some twenty-six in number, were claimants, other than the Brunos, to title in the land, claimants to oil leases in the land, and claimants by virtue of purchase or assignment to royalty interests in the land.

c. The subject-matter, as hereinbefore noted, was not the same. The relief sought was not the same.

d. Recovery by petitioners herein of all they claim will overturn and undue no title or claim of title, but merely allow to them the benefits of a contract for the recovery of oil royalties.

e. The capacity of the plaintiff, United States, in the Getzelman case, and the capacity of the appellants in the

case at bar with respect to things sued for are not identical, nor substantially the same. The appellants would not have had the capacity to maintain a suit to quiet legal title in the United States or restore to it its trust rights and obligations. Nor could the United States maintain an action to recover royalties on the contract sued on for the benefit of the petitioners, or otherwise, because there is, under the contract, no trust or restricted Indian property involved. (*Johnson* v. *Whalen*, 186 Okla. 511, 98 P. (2) 1103.

f. *Bruno* v. *Getzelman*, 70 Okla. 143, 173 P. 850, relied on in part by the trial court cannot be res judicata as to any matter arising under the contract sued on because it was decided more than ten years before the execution of the contract.

g. Finally, it is well to consider the precise requirements of the Oklahoma Supreme Court in the matter of application of the doctrine of res judicata:

> "In order to make a matter res judicata, there must be concurrence of four conditions following: (a) identity in the thing sued for or subject matter of the action; (b) identity of the cause of action; (c) identity of the persons or parties in action; and (d) identity of the capacity in the person for or against whom the claim is made." Johnson v. Whalen, et al. 186 Okla. 511, 98 Pac. (2d) 1103.

As to the suggestion of the 10th Circuit Court of Appeals that the case at bar amounts merely to a piecemeal presentation of the issues that were determined in the Getzelman case, supra, it is respectfully submitted that on the basis of the foregoing reasons cited, there was no identity, even of the vaguest kind, between the suit of the U. S. to quiet title in the Getzelman case and the present action of the petitioners to recover oil royalties provided for under explicit contract.

Petitioners respectfully submit that the views enunciated by the 10th Circuit would do irreparable harm and injury

to the wholesome doctrine affecting the settlement of projected litigation by compromise in that any prospective litigant settling out of court might very well have his position jeopardized and his consideration wrongfully taken from him by litigation initiated long subsequent thereto. It will be remembered that the Getzelman case on which the 10th Circuit Court of Appeals depends in order to deny the petitioners their recovery to oil royalties in the case at bar was filed some five years after the contract was signed and not settled definitely until refusal of this Honorable Court to grant certiorari, 302 U. S. 708, 82, L. Ed. 547 on October 11, 1937, or nine years thereafter.

CONCLUSION.

Wherefore, the premises considered, it is respectfully submitted that the decision below clearly was in error and should be reviewed by this Court. Accordingly, the writ prayed for should issue.

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HIRAM P. WHITE,
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(12)

No. 961

In the Supreme Court of the United States

October Term, 1943.

RALPH W. WHITE, ADMINISTRATOR OF THE ESTATE OF MARY VIEUX BRUNO, DECEASED; JOHN A. BRUNO, ETHEL BRUNO SHOPWETUCK, MARY BRUNO WEBB, OSE BRUNO DE LONAIS, NORA BRUNO KEMOHAH, JOHN A. BRUNO, JR., AND EVELINE BRUNO CODY, *Petitioners,*

vs.

SINCLAIR PRAIRIE OIL COMPANY, A CORPORATION; THE PRAIRIE OIL AND GAS COMPANY, A CORPORATION; MID-KANSAS OIL AND GAS COMPANY, A CORPORATION, AND THE OHIO OIL COMPANY, A CORPORATION, *Respondents.*

Brief of Respondents in Opposition to Petition for Writ of Certiorari.

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STATUTE.

IN THE SUPREME COURT OF THE UNITED STATES.
October Term 1943.

No. 961

Ralph W. White, Administrator of the Estate of Mary Vieux Bruno, deceased; John A. Bruno, Ethel Bruno Shopwetuck, Mary Bruno Webb, Ose Bruno DeLonais, Nora Bruno Kemohah, John A. Bruno, Jr., and Eveline Bruno Cody,
Petitioners,
vs.
Sinclair Prairie Oil Company, a corporation; The Prairie Oil and Gas Company, a corporation; Mid-Kansas Oil and Gas Company, a corporation, and the Ohio Oil Company, a corporation, ***Respondents.***

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*.

Respondents believe that petitioners' statement of the questions presented and of the facts does not set forth fully, clearly and sufficiently the record and facts to be considered in order to determine the questions involved and therefore submit the following supplemental statement:

Supplemental Statement.

The approval by the Secretary of the Interior on November 21, 1903, of the deed executed on March 19, 1903, by John Bruno to Mary Bruno, conveying the eighty acres of

land involved in this action, was under the Act of Congress of August 15, 1894 (28 Stats. 286), which Act of Congress provided,

> "That upon the approval of such deed by the Secretary of the Interior the title to the land thereby conveyed shall vest in the grantee therein named and the land sold and conveyed under the provisions of this Act shall upon proper recording of deeds therefor be subject to taxation as other lands in said Territory,"

and the deed from John Bruno to Mary Bruno so approved by the Secretary of the Interior under the Act of Congress aforesaid was delivered to the grantee and placed of record on the deed records of Pottawatomie County, Oklahoma, on March 4, 1904. The approval thereof by the Secretary of the Interior was not inadvertently made but was regularly made and valid as found and determined by the Supreme Court of Oklahoma in *Bruno* v. *Getzelman*, 70 Okl. 143, 146, 173 Pac. 850, and by the United States Circuit Court of Appeals for the Tenth Circuit in *United States of America* v. *Getzelman*, 89 F. (2d) 531, *certiorari* denied, 302 U. S. 708, 82 L. ed. 547, and by the United States Circuit Court of Appeals for the Tenth Circuit in this action, 139 F. (2d) 103.

The oil and gas leases, one to The Prairie Oil & Gas Company, executed by W. H. Desmond on June 8, 1925 (R. 18), and the other by B. C. Getzelman and wife, *et al.*, to Omer McKown of date July 22, 1926 (R. 21), both contained general warranties of title in words as follows:

> "Lessor hereby warrants and agrees to defend the title to the lands herein described * * *." (R. 21 and 24)

and each of said leases further contained a lesser interest clause substantially in words as follows:

> "If said lessor owns a less interest in the above described land than the entire and undivided fee simple

estate therein, then the royalties and rentals herein provided shall be paid the lessor only in the proportion which its interest bears to the whole undivided fee." (R. 20 and 23)

And by adopting and ratifying said leases by contract of settlement (Ex. "C," R. 25), Mary Bruno and John Bruno, their heirs, executors, administrators and assigns, became bound by the terms thereof.

Respondents in this action complied with the provisions of the contract of settlement (Ex. "C", R. 25) in all respects by making payment of the cash consideration provided for therein and upon the denial by the Supreme Court of the United States of writ of *certiorari* in the action of *United States of America* v. *Getzelman, et al.*, made distribution of the impounded royalties and thereafter the royalties accruing under said leases to the lessors in said leases, their grantees and assigns (R. 54 and 111) in good faith and in full reliance on the binding force and effect of the provisions of said leases and of the judgment in said action.

The action instituted by the *United States of America*, as plaintiff, v. *B. C. Getzelman, W. H. Desmond, et al., supra*, was brought by the United States on request of the Secretary of the Interior and by direction of the Attorney General (R. 58) on its own behalf and in behalf of Mary Bruno, the purpose of said action being to establish Mary Bruno's title, to obtain an accounting of royalties under the oil and gas leases which had been impounded and to obtain a decree adjudging her to be entitled to the impounded royalties and future royalties to accrue under such leases.

BRIEF.

Therefore, the question presented in this case for consideration is not "whether a contract of compromise and settlement bottomed on forbearance in the matter of filing suit could be invalidated by separate litigation as to title initiated approximately five years subsequent to the execution of the contract" (petition for writ of *certiorari* and brief in support thereof of petitioners, page 9), but is simply whether the lower courts have correctly construed and applied the contract of settlement as between the plaintiffs and respondents.

The sole specification of error assigned by petitioners is that the United States Circuit Court of Appeals for the Tenth Circuit erred in ruling that a contract of compromise and settlement with respect to the matter of forbearing from filing suit to collect Indian oil land royalties would be invalidated by subsequent litigation determining that the claimants of the royalties had no right, title or interest in the lands in question. No such effect can be given to the determination of the trial court, and the decision of the United States Circuit Court of Appeals for the Tenth Circuit. Each of said Courts found and determined that the petitioners under the contract of settlement and under the provisions of the oil and gas mining leases ratified and adopted thereby had no right of recovery and that any such right they might have had was adjudicated against them by the prior decisions. *Bruno, et al.*, v. *Getzelman, et al., supra; United States* v. *Getzelman, supra.*

The decision of the United States Circuit Court of Appeals for the Eighth Circuit in *Kiefer Oil & Gas Co.* v. *Mc-*

Dougal, 229 Fed. 933, relied upon by petitioners, is without application, for in that case the oil and gas lease was not adopted but was made separately by an adverse claimant to the land and as a part of a compromise settlement. The lessee in said lease firmly bound itself to pay a stated sum to the lessor as bonus and a stated royalty without regard to the character of lessor's title, there being no warranty of title of any kind contained in the lease involved therein. Said lease evidenced the firm commitment and consideration agreed to be paid therefor by Kiefer Oil & Gas Company to McDougal independently of the other leases held by it from other claimants.

There is no parallel as between the facts in the *Kiefer* case and the facts in this action. The petitioners by the provisions of the contract of settlement (R. 25) ratified, adopted and approved the oil and gas leases held by the respondents as fully as though they had originally executed such leases at the date of the execution thereof and for the consideration paid therefor, so that the petitioners and their predecessors in interest should have no further claims of any kind or character except as to the royalty to be paid under the oil and gas leases held by the respondents, which royalties the petitioners reserved their right to make claim to, and such was the holding of the trial court and the holding of the Circuit Court of Appeals for the Tenth Circuit.

The Supreme Court of the State of Okahoma in the case of *Bruno, et al.,* v. *Getzelman, et al., supra,* had decided that the deed from John Bruno to Mary Bruno was valid and effective, however since the United States was not a party to said action and not bound by the decision the question remained open as to whether or not if the United States should institute an action the courts of the United States

would see fit to follow the rule announced by the state court. The United States did thereafter file an action, *United States of America* v. *Getzelman, et al., supra,* setting up generally the record with respect to the action taken by the Department of the Interior in reference to the allotment of land to John Bruno and Mary Bruno, the effect of the deed from John Bruno to Mary Bruno and the attempted reallotment of said land to Mary Bruno and the facts with respect to the execution of the oil and gas leases and mineral deeds covering the royalty interest of the lessors in said leases and seeking the recovery of the impounded royalties and the royalties to accrue under said leases on behalf of Mary Bruno, there clearly being placed in issue by the allegations of the amended bill of complaint (R. 58) all rights, titles and interest that Mary Bruno might have or claim to have in the lands, the rents and the royalties emanating therefrom and in the impounded royalties in the hands of respondents. The final determination of this action brought by the United States on behalf of Mary Bruno was not only binding upon the United States but upon Mary Bruno as well and constituted an adjudication as against petitioners in this action.

—*Heckman* v. *United States,* 224 U. S. 413, 56 L. ed. 820;

Bryan County, Okla., et al., v. *United States,* 123 F. (2d) 782, *certiorari* denied 62 S. Ct. 907, 86 L. ed. 1216;

Privett v. *United States,* 256 U. S. 201, 41 S. Ct. 455, 65 L. ed. 889;

United States v. *Candelaria,* 271 U. S. 402, 46 S. Ct. 561, 70 L. ed. 1023;

Mars, et al., v. *McDougal, et al.,* 40 F. (2d) 247, *certiorari* denied, 282 U. S. 850, 75 L. ed. 753.

The trial court and the Circuit Court of Appeals for the Tenth Circuit correctly construed and applied the provisions of the contract of settlement (Ex. "C", R. 25) and the petitioners in their brief (p. 20) concede that the instrument thereafter executed by John Bruno and Mary Bruno (Ex. "D", R. 27) in nowise tended to alter or modify the provisions of Exhibit "C" but to insure the binding effect thereof. There was no agreement contained in Exhibit "C" by which the respondents were to pay any royalties other than those payable under the terms of the oil and gas leases, it being expressly stipulated therein that the only claim which the Brunos retained under Exhibit "C" (R. 25) was the right to claim royalties to be paid under said leases—that is according to the terms of said leases. Having adopted said leases, the Brunos were bound by the lesser interest clause therein and subscribed to the covenant of warranty of title contained in said leases. The effect of the lesser interest clause has been determined by the Supreme Court of Oklahoma in *Hooks* v. *Rocket Oil Co.,* 191 Okl. 431, 130 P. (2d) 846, and by the District Court of the United States for the Eastern District of Illinois in *Koval* v. *Carnahan, et al.,* 45 Fed. Supp. 357. Under the authority of these decisions it is not open to question that the construction placed upon the contract (Exhibit "C") by the trial court and by the Circuit Court of Appeals for the Tenth Circuit was correct, that petitioners had no interest in the royalties to be paid under said leases and that there was no contract or commitment on the part of the lessees, the respondents, to pay a royalty of one-eighth in addition to the royalty prescribed under the terms of said leases. *United Carbon Co., et al.,* v. *Maynard,* (Court of Appeals of Kentucky) 284 Ky. 823, 146 S. W. (2d) 45.

Inasmuch as the United States in the action filed by it on behalf of Mary Bruno asserted on behalf of Mary Bruno the right to all the oil and gas, including all royalties impounded or to be paid under the oil and gas leases of respondents, it does not admit of doubt that petitioners' present claim to a royalty of one-eighth of the oil to be produced under said leases was involved in said action even though the contract sued on by petitioners in this action was not specifically pleaded by the United States in its amended bill of complaint filed in the action instituted by it. The United States was fully informed as to the existence and contents of Exhibits "C" and "D" at the time of the filing of said action for Exhibit "D" was dated March 14, 1930, and approved by the Secretary of the Interior May 2, 1930, and the action by the *United States of America,* as plaintiff, v. *B. C. Getzelman, et al.,* as defendants, *supra,* was filed in the United States District Court for the Western District of Oklahoma on November 2, 1933. The conclusion, therefore, is unescapable that the United States of America was fully cognizant of the terms and provisions of Exhibit "C" and Exhibit "D" and that therefore the judgment in said action adjudicated and disposed of the claim of petitioners herein. *Vinson* v. *Graham,* 44 F. (2d) 778.

The petitioners attempt to create an exception or reservation by the language used in the contract of settlement, Exhibit "C" (R. 25) which reserves to them the right to claim royalties to be paid under the oil and gas leases, it being established by the decisions in the *Getzelman* cases, *supra,* that Mary Bruno and John Bruno had no title to the land involved or any part thereof, and an attempt to so create an exception or reservation must fail primarily for the reason that no such exception or reservation was made or intended to be made by the language used and even if proper

nguage had been made use of to express a reservation or xception still it must fail for the reason that to be effectual here must be a subject matter on which such reservation or xception can operate, and since John Bruno and Mary Bruo had no title to the land involved and no interest in the oyalties to be paid under said oil and gas leases the lanuage relied upon could not have the effect of vesting in hem the right to such royalties because they had no estate n either land or royalties out of which such reservation or xception could arise. The rule in this respect is stated in 6 C. J. S. 446, Sec. 139, as follows:

> "An exception or reservation is void where there is nothing for either to operate on or where the grantor had no interest or estate in the thing excepted. A reservation or exception can only be out of the estate granted. A reservation to be effective as such must refer to something conveyed and an exception must be a part of the thing granted and not of some other thing."

Conclusion.

Respondents, respectfully represent that the decisions rrived at by the trial court and by the Circuit Court of Appeals for the Tenth Circuit are correct under the authorties and reasons herein and therein set forth and that no ubstantial or meritorious question is presented for review nd therefore the petition for writ of *certiorari* should be enied.

Dated this 25th day of May, 1944.

Respectfully submitted,

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